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SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. [redacted]

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner

vs.

WILLIE B. CONNER,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF
THE STATE OF MICHIGAN

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Now comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Edward Reilly Wilson, Chief Appellate Attorney and Timothy A. Baughman, Assistant Prosecuting Attorney, and prays that a Writ of Certiorari issue to review the judgement of the Court of Appeals of the State of Michigan, entered in the above-entitled cause on December 9, 1977, leave to appeal denied by the Michigan Supreme Court on August 31, 1978.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported, and is appended as Appendix "A". The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal is appended as Appendix "B".

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on December 9, 1977. The Michigan Supreme Court denied Petitioner's application for leave to appeal on August 31, 1978. The jurisdiction of this Court is invoked under 28 USC, Sec. 1257(3).

QUESTION PRESENTED

SHOULD THE EXCLUSIONARY RULE APPLY TO SUPPRESS ITEMS SEIZED PURSUANT TO A WARRANT OBTAINED FROM A MAGISTRATE WHICH WARRANT IS LATER FOUND TO BE TECHNICALLY DEFECTIVE?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause,

> supported by oath or affirmation, and particularly describing the the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

On April 3, 1976, at approximately 5:30 p.m., Detroit Narcotics Officers, armed with a search warrant, searched an apartment with an address of 11643 East Vernor. After knocking on the door and announcing "Police, open the door, we have a search warrant for the premises" running was heard, and the officers forced open the door. Respondent was told to freeze, and a clear plastic bag containing heroin was taken from his hand. Respondent was ultimately bound over for trial for possession of heroin.

A motion to suppress the evidence was brought. At the hearing it was revealed that the search warrant described the premises to be searched as follows:

> A two story brick building, located on the north west corner of Vernor and Lycaste. Having an address of 11643 E. Vernor, and being the middle door, goin (sic) upstairs, with the address of 11641 and 11645 on the two down stairs door (sic). To search the entire premises of the second floor apartment on the east side. Located in the City of Detroit, County of Wayne and State of Michigan. (See Appendix "C").

The affidavit establishing probable cause, however, referred to the address as "11641 East Vernor", though also describing it as "Second floor east apartment". (Appendix

"C"). The trial court ruled that the variance was fatal to the warrant, suppressed the evidence, and dismissed the charges.

Petitioner appealed by right to the Michigan Court of Appeals, contending 1) that the affidavit and warrant described the place to be searched with sufficient certainty; 2) that the officer orally described the premises to the magistrate who signed the search warrant as 11643 East Vernor; and 3) that application of the exclusionary rule was in any event inappropriate. The Michigan Court of Appeals affirmed the trial court on December 9, 1977, holding in response to Petitioner's exclusionary rule argument:

> Finally, the prosecutor urges us to adopt a "good faith" exception to the rule that evidence seized illegaly by police must be suppressed. The United States Supreme Court has not expressly modified the exclusionary rule of Mapp v Ohio with a "good faith" exception. We must follow the dictates of Mapp, which held that all evidence obtained in unconstitutional searches and seizures was inadmissible in state courts. Even an inadvertant or good faith mistake resulting in an unconstitutional search and seizure therefore requires exclusion of the evidence seized. (Emphasis added)

On August 31, 1978, the Michigan Supreme Court denied Petitioner's application for leave to appeal.

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals, in response to Petitioner's argument that application of the exclusionary rule serves no valid purpose when the police err in good faith, held that "Even an inadvertent or good faith mistake resulting in an unconstitutional search and seizure...requires exclusion of the evidence seized". The court felt constrained to so hold by its fealty to this Court in federal constitutional matters: "The United States Supreme Court has not expressly modified the exclusionary rule of Mapp v Ohio with a 'good faith' exception. We must follow the dictates of Mapp, which held that all evidence obtained in unconstitutional searches and seizures was inadmissible in state courts." Petitioner submits that the logic of recent decisions of this Court leads inexorably to the conclusion that suppression of the truth in a criminal proceeding is inappropriate where police conduct cannot be characterized as "lawless", but at worst must be described as honestly mistaken. Further, Petitioner submits that absent deliberate falsehood or reckless disregard for the truth by the affiant on a material matter, it is always inappropriate to apply the exclusionary rule to searches of proper scope and intensity undertaken pursuant to a technically invalid warrant, for the police have done that which the law prefers; they have taken their information to a judicial officer. If the judicial officer issues a defective warrant the

mistake lies not with the police but the judicial officer, and the exclusionary rule has never been said by this Court to have as a purpose the deterring of errors by judicial officers.

The facts of the instant matter reveal the most technical of errors -the warrant described the place to be searched as 11643 East Vernor, second floor east apartment, while the affidavit described the premises as 11641 East Vernor, second floor east apartment (the building was a multi-unit dwelling with three addresses and three doors, 11641, 11643, and 11645). This Court has made plain that application of the exclsuionary rule, which is not a personal constitutional right of the person aggrived, United States v Calandra, 414 US 338, 348; 94 S Ct 613, 620; 38 LEd 2d 561 (1974) depends on whether exclusion of the evidence would deter willful or negligent police conduct which violated some right of the accused. See United States v Janis, 428 US 433; 96 S Ct 3021; 49 LEd 2d 1046 (1976): "The Court ... has established that the 'prime purpose ' of the rule, if not the sole one, 'is to deter future unlawful police conduct'" (emphasis added), and Stone v Powell, 428 US 465, 486; 96 S Ct 3037; 49 LEd 2d 1067 (1976): "The primary justification for the exclusionary rule...is the deterrence of police conduct that violates Fourth Amendment rights." Keeping in mind the observation in Calandra, 414 US at 348, that "Application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," and

that in Michigan v Tucker, 417 US 433, 446; 94 S Ct 2357; 42 LEd 2d 182 (1974) that "where the official action was pursued in complete good faith...the deterrence rationale loses much of its force, "it becomes apparent that application of the exclusionary rule to the good faith error in this case serves no valid purpose.

This Court has also held that the decision of whether the exclusionary rule should apply to a given type of situation involves a balancing process.

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police therefore, we must consider whether the sanction serves a valid and useful purpose. (emphasis added). Michigan v Tucker, 417 US at 446.
>
> ...when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence. Michigan v Tucker, 417 US at 450.

Professor Anthony Amsterdam has stated the need to limit the exclusionary rule to situations where its deterrent function is clearly served thusly:

> As it serves this function, the rule is a need, but grudgingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest..." Amsterdam, Search, Seizure, and Section 2255: A Comment, 1120 PA L Rev 378, 388-389 (1964).

To exclude the truth in a case such as the instant one, where the error, such as it was, was made in good faith, is to inflict "gratuitous harm on the public interest", and serves no valid purpose.

Moreover, the error in this case should properly be laid at the feet of the magistrate. The police simply presented the warrant and affidavit; it was the magistrate who issued it. The defective warrant is the magistrates', not the police officials. Given that "...the regulation of police behavior is what the Fourth Amendment is all about", Amsterdam, Perspectives on the Fourth Amendment, 58 Minn L Rev 349, 369 (1974), exclusion of evidence seized pursuant to warrant is never appropriate absent deliberate falsehood or reckless disregard of the

truth on a material matter by the affiant. It is simply not the function of the exclusionary rule to deter magistrates from making mistakes. The police having acted in good faith in a manner which the law prefers, exclusion of the evidence was inappropriate. The Michigan Court of Appeals should be reversed.

CONCLUSION

It is respectfully submitted that for the reasons outlined above plenary review should be granted.

Respectfully submitted,

WILLIAM L. CAHALAN
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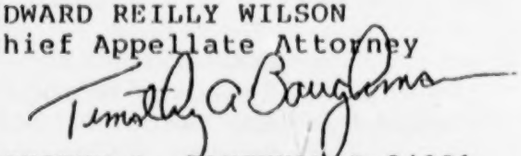
Wayne County
State of Michigan

EDWARD REILLY WILSON
Chief Appellate Attorney



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Dated: October 1, 1978

APPENDIX "A"

OPINION OF THE MICHIGAN COURT OF APPEALS
Dated December 9, 1977

BEFORE: J. H. Gillis, P.J., and Bronson and Robinson, JJ.

PER CURIAM

This is an appeal from an order granting defendant's motion to suppress evidence seized in a search of 11643 East Vernor and dismissing the charge of possession of heroin. MCLA 335.341; MSA 18.1070(41).

A search warrant was issued for 11643 East Vernor "to search the entire premises of the second floor apartment on the east side and to seize * * * heroin, narcotics and narcotics paraphenalia* * *." This warrant was issued on the basis of the affidavit of a Detroit police officer, which describes surveillance and a narcotics purchase by an informant at 11641 East Vernor, also described as "11641 East Vernor, second floor east apartment".

The testimony at the suppression hearing indicated that the building in question is a multiple unit structure. It has one front porch and three doors, bearing the addresses 11641, 11643 and 11645 respectively. The middle door, 11643, leads to a stairway which goes upstairs. The two other doors lead to downstairs units. 11643 is the correct address of the second floor east apartment.

The issue presented is whether the search warrant for 11643, second floor east apartment, was properly issued on the basis of an affidavit describing the place to be searched as 11641 and 11641, second floor east apartment.[1]

In People v Lienartowicz, 225 Mich 303, 304-305; 196 NW 326 (1923), the Court stated;

> "It is urged that a different place to be searched is set forth in the warrant from that in the affidavit and that the warrant is therefore void. The affidavit gave the magistrate the right to issue a search warrant to search the place mentioned in the affidavit, no other place. People v Musk, 221 Mich 578. Nice or technical descriptions are not required. A description pointing out a definitely ascertainable place in terms of reasonable certainty is sufficient. People v Flemming, 221 Mich 609." (Emphasis added)

The warrant in the case at bar was not properly issued because the affidavit fails to describe "a definitely ascertainable place in terms of reasonable certainty". At best, it described two places, 11641 and the second floor east

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[1]There are four references in the affidavit to 11641 East Vernor. In one, the place to be searched is also described as 11641 East Vernor, second floor east apartment.

apartment. In any event, an affidavit concerning activities at 11641 cannot supply probable cause for a warrant to search 11643. People v Lienartowicz, supra.

The officer testified at the suppression hearing that he "had a conversation" with the magistrate and told him that he wanted a warrant for 11643 because that was the place that had actually been under surveillance. There is no record or transcript, however, of any sworn statement other than the affidavit described above, and the officer's testimony at the suppression hearing does not indicate that he gave any sworn testimony before the magistrate. We must therefore conclude that the statement was not under oath. Since it was unsworn, it may not be considered in determining whether the search warrant was validly issued. See, e.g., Flanagan v Rose, 478 F2d 222 (CA 6, 1973). See also, People v Warner, 221 Mich 657; 192 NW 566 (1923), which states that the affidavit must be sufficient on its face.[2] To allow supplementation of an affidavit by unrecorded testimony would undermine the rationale of the requirement of a written affidavit --to allow review of the magistrate' probable cause determination. See MCLA 780.653; MSA 28.1259(3); People v Knopka, 220 Mich 540; 190 NW 731 (1922).

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[2]We note that a contrary rule has developed in many federal courts where sworn testimony is presented. See, generally, 24 ALR Fed 107.

Finally, the prosecutor urges us to adopt a "good faith" exception to the rule that evidence seized illegally by to adopt a "good faith" exception to the rule that evidence seized illegally by police must be suppressed. The United States Supreme Court has not expressly modified the exclusionary rule of Mapp v Ohio[3] with a "good faith" exception. We must follow the dictates of Mapp, which held that all evidence obtained in unconstitutional searches and seizures was inadmissible in state courts. Even an inadvertent or good faith mistake resulting in an unconstitutional seach and seizure therefore requires exclusion of the evidence seized.

Affirmed.

[3] 367 US 643; 81 S Ct 1684; 6 LEd 2d 1081 (1961).

APPENDIX "B"

ORDER OF THE MICHIGAN SUPREME COURT

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the City of Lansing, on the 31st day of August in the year of our Lord one thousand nine hundred and seventy-eight.

Present: The Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should be reviewed by this Court.

State of Michigan -- ss. I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 31st day of August in the year of our Lord one thousand nine hundred and seventy-eight.
/s/ Corbin R. Davis, Deputy Clerk

APPENDIX "C"

SEARCH WARRANT

STATE OF MICHIGAN COUNTY OF WAYNE

TO THE SHERIFF OR ANY PEACE OFFICER OF SAID COUNTY: On this day * * MICHAEL CALLAGHAN* * affiant, having subscribed and sworn to an affidavit for a Search Warrant, and I having under oath examined affiant, am satisfied that probable cause exists;

THEREFORE, IN THE NAME OF THE PEOPLE OF THE STATE OF MICHIGAN, I command that you search the following described place:

A TWO STORY BRICK BUILDING, LOCATED ON THE NORTH, WEST CORNER OF VERNOR AND LYCASTE. HAVING AND ADDRESS OF 11643 E. VERNOR, AND BEING THE MIDDLE DOOR, GOIN UPSTAIRS, WITH THE ADDRESSES OF 11641 AND 11645 ON THE TWO DOWN STAIRS DOOR. TO SEARCH THE ENTIRE PREMISES OF THE SECOND FLOOR APARTMENT ON THE EAST SIDE. LOCATED IN THE CITY OF DETROIT, COUNTY OF WAYNE AND STATE OF MICHIGAN.

and to seize, secure, tabulate and make return according to law the following property and things:

HEROIN, NARCOTICS AND NARCOTIC PARAPHERNALIA, GUNS AND MONIES USED IN THE TRAFFICING OF NARCOTICS.

The following facts having been sworn to by affiant in support of the issuance of this Warrant:

1. THE AFFIANT STATES THAT HE IS A MEMBER OF THE DETROIT POLICE DEPARTMENT WORKING IN CONJUNCTION WITH AN INFORMANT, CONCERNING THE PURCHASE OF HEROIN AT 11641 E. VERNOR, FROM A BLACK MALE KNOWN AS (CLIO).

2. THE AFFIANT STATES THAT THE INFORMATION IS A CREDIBLE AND RELIABLE INFORMANT WHO HAS BEEN USED ON AT LEAST (4) OCCASIONS WITH (7) ARRESTS AND (4) CONVICTIONS WITH (3) CASES STILL PENDING.

3. FROM MARCH 19TH 1976 THROUGH PART OF APRIL 2, 1976 A PERIODIC SURVEILLANCE OF 11641 E. VERNOR WAS MADE. SEVERAL KNOWN NARCOTIC USERS WERE OBSERVED ENTERING AND EXITING THE PREMISES, MOST OF THESE PERSONS STAYING ONLY A SHORT TIME, THEN EXITING.

4. ON APRIL 2, 1976 THE AFFIANT WORKING IN CONJUNCTION WITH THE INFORMANT, WENT TO THE AREA OF 11641 E. VERNOR. THE AFFIANT THEN SEARCHED THE INFORMANT FOR NARCOTICS AND MONEY AND FOUND NONE. THE AFFIANT THEN FURNISHED THE INFORMANT WITH PRE RECORDED SECRET SERVICE FUNDS, AND THE INFORMANT WENT TO AND ENTERED THE ABOVE ADDRESS. AFTER ABOUT FIVE MINUTES THE INFORMANT EXITED THE PREMISES AND CAME DIRECTLY TO THE AFFIANTS CAR, WHERE THE INFORMANT GAVE THE AFFIANT A SINGLE TAN COIN ENVELOPE CONTAINING SUSPECTED HEROIN. INFORMANT THEN STATED THAT IT WAS PURCHASED FROM A BLACK MALE KNOWN AS "CLIO", AND THAT AT THE TIME OF THE

PURCHASE "CLIO" WAS ARMED WITH A HAND GUN. THE AFFIANT THEN SEARCHED THE INFORMANT FOR NARCOTICS AND MONEY AND FOUND NONE. A SHORT TIME LATER THE AFFIANT FIELD TESTED THE CONTENTS OF THE PURCHASE AS HEROIN AND PLACED IT IN A LOCK SEAL FOLDER AND SENT IT TO THE POLICE LAB TO BE ANALYZED.

5. ON APRIL 3RD, 1976 AFFIANT AGAIN MET WITH INFORMANT WHO STATED THAT HE HAD JUST BEEN INSIDE 11641 E. VERNOR, SECOND FLOOR EAST APARTMENT AND WHILE THERE HAD OBSERVED "CLIO" MIXING AND CUTTING A LARGE QUANTITY OF HEROIN, PLACING THE HEROIN IN SMALL ENVELOPES FOR DISTRIBUTION. INFORMANT FURTHER STATED THAT "CLIO" WAS ARMED WITH A HANDGUN WHICH HE CARRIED IN THE WAISTBAND OF HIS PANTS. THE SERIAL NUMBER AND MAKE OF THE WEAPON ARE UNKNOWN TO INFORMANT.

6. AFFIANT FURTHER STATES THAT THIS INFORMATION IS FAMILIAR WITH THE PHYSICAL CHARACTERISTICS OF HEROIN, IT'S TEXTURE, COLOR AND SMELL. THE AFFIANT IS KNOWLEDGEABLE OF THE FACT THAT THE SAID INFORMANT IS AWARE OF THESE FACTS, BASED ON PRIOR CONTROLLED NARCOTICS PURCHASES, AND OTHER NARCOTIC RELATED INFORMATION SUPPLIED TO AFFIANT BY THIS INFORMANT.

/s/ Michael Callaghan

Issued under my hand this 3rd day of April, 1976.

/s/
Judge of Recorder's Court,
City of Detroit